IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 501 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURESH GULABSING KUSHVAH AND RAVIKARAN
KAMTAPRASAD YADAV

Versus

STATE OF GUJARAT

Appearance:
MR G RAMAKRISHNAN for Appellants No.1 & 2
MR SS PATEL, APP for the State

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 25/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellants have challenged the judgement and order dated 26th March 1993 of the learned City Sessions Judge, Ahmedabad in Sessions Case No. 180 of 1992 convicting the appellant - accused No.1 for the offence under section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 and the accused No.2 for the offence under section 20 read with section 29 of the said Act, and also convicting both of them for the offence under section 66(b) of the Bombay Prohibition Act, and sentencing both the accused to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1 lakh, in default of the payment of which, to undergo a further rigorous imprisonment for a period of 3 years. No separate sentence was awarded under section 66(b) of the Bombay Prohibition Act.

2. The prosecution case is that, on 6th February 1992, the P.S.I. of Shaher Kotada police station received an information to the effect that one Suresh Gulabsinh Thakur, aged about 30 years who had put on a sky-blue bushirt with checks and a brown pant and one other person Ravikaran Yadav, aged about 25 years, wearing a full sleeved blue shirt with linings and a cream coloured pant, were going to come from Suhana Restaurant side with `charas' and were to proceed towards Omkar Factory via Kalyan Toll Naka. The P.S.I. gave this information in writing to the police inspector and after it was noted down in the station diary, panchas were called and the police party proceeded alongwith the panchas to keep a watch. The information was received at 12.55 p.m. and recorded in the station diary at 13.05 p.m. The P.S.I. intimated to the P.I. about this information in his communication at exh. 19.

2.1 While they were keeping a vigil, in about 20 minutes time, two persons of the aforesaid description were found coming from Suhana Restaurant side. The person with sky-blue bushirt with checks and a brown pant was carrying a cloth bag (`theli') and the other was walking alongwith him. When they were stopped by the police party, the accused No.1, who was carrying cloth bag, was apprehended at the place where he was stopped, while the accused No.2, who turned back and tried to run away, was caught by the police persons. The accused No.1 gave his name as Suresh Gulabsinh Kushwah Thakur, aged 30 years, resident of Swaminarayan Vibhag - 2, Ahmedabad. The other person gave his name as Ravikaran Kamtaprasad Yadav, aged 25 years, resident of Premnagar, Opp. Railway Line, Ahmedabad. They were asked whether they would like to be searched in presence of a magistrate or

a higher gazetted officer, but they said that they did not want to be searched before a magistrate or a higher gazetted officer. They were offered to search the police persons, but they said that did not want to search them. Thereafter, from the cloth bag which was carried by the accused No.1, a bundle was taken out in presence of the panchas and when that bundle was opened, there came out from it dark pieces of material wrapped in a plastic bag. On sniffing that material, it appeared to be `charas'. The `charas' was weighed by calling a goldsmith. The pieces of `charas' weighed in all 2 kilograms & 750 grams. Three samples of 50 grams each were drawn and duly packed and sealed. The remaining quantity was also duly packed and sealed. The seal of Inspector of Police, Shaher Kotada police station was affixed on all these packets. The panchnama exh. 21 was drawn in respect of the search and seizure in presence of the panchas. The muddamal sample was forwarded to the Forensic Science Laboratory and as per the report of the Forensic Science Laboratory at exh. 46, the result of the analysis showed that the sample which was subjected to analysis contained botanical material of plant cannabis sativa (`charas'). The Charge was framed as per exh. 6 and the trial Court, on the basis of the material on record, came to a finding that both these accused persons were apprehended on 6-2-1992 at about 1.00 p.m. with 2750 grams of `charas', which was carried by the accused no.1 in cloth bag (`theli'). It was held that the material which was recovered from the accused persons was `charas' within the meaning of section 2(iii)(a) of the said Act. The accused were, therefore, held guilty of the offences with which they were charged and punished as narrated hereinabove.

3. Witness Hamanullakhan Pathan, PW-1, has deposed at exh. 17 that, on 6-2-1992, at 13.05 p.m., he was on duty at Shaher Kotada police station and around 01.05 p.m., the police inspector Chaudhary had called the staff of the surveillance squad and intimated to all of them about the information that was received as per which the accused were to come from Suhana Restaurant side with `charas' and via Kalyan Toll Naka, they were to go towards the Omkar Factory. This witness has given particulars of the manner in which they had kept a watch and ultimately apprehended the two accused persons with `charas' in a `theli' which was carried by the accused No.1.

3.1 The prosecution witness No.2 - Ratanbhai Chaudhary was serving as a P.S.I. during the relevant period in Shaher Kotada police station and he has deposed

at exh.18 that, on 6-2-1992, while he was on duty and had returned after patrolling the area under the jurisdiction of his police, he got an information around 1 o'clock in the noon that Suresh Gulabsinh Thakor and Ravikaran Yadav were to come from the side of Suhana Restaurant with illicit `charas' and to go towards Omkar Factory via Kalyan Toll Naka. He has stated that he had dictated this information to his writer constable and had also informed the police inspector in writing about it. He has proved the intimation given by him to his superior officer, the police inspector, about the information at exh.19. He has then narrated the entire incident and fully supported the prosecution version on all material particulars, including, the watch being kept by the police party alongwith panchas and the accused persons arriving at that place within 20 minutes, the accused No.1 having been apprehended at the place where they were stopped and the accused No.2 who tried to turn back and run, having been pursued by the police constable and apprehended, about the material which was taken out from the `theli' carried by the accused No.1 which was weighed in presence of panchas and the seizure of that material after taking samples and the sealing of such packets. He has denied the suggestion made in paragraph 9 of his deposition that the writing exh.19 was subsequently got up.

3.2 The panch witness - Shantilal Manabhai Solanki, at exh. 20, has proved the panchnama exh. 21 and the deposition of this witness duly corroborated by the panchnama clearly establishes that the panchas were apprised of the information received by the police that these two accused persons were to come from Suhana Restaurant side with illicit `charas' on 6-2-1992. They had accompanied the police party and a vigil was kept for about 20 minutes, after which the accused were found coming from Suhana Restaurant side. This witness has stated that both the accused were apprehended by two constables who had rushed towards them. This witness has identified the accused persons as the persons who were so apprehended. He has also deposed to the fact that, from the `theli' which the accused No.1 was carrying, 2 kilograms and 750 grams of material which was described as `charas' was taken out and three samples of 50 grams each were drawn. He has also deposed to the fact that all these samples were affixed with the slips signed by the panchas and were duly sealed. He has also mentioned about the person who was called to weigh the material when it was seized. In his cross examination, he has stated that he had never acted as a panch prior to this case and that there were no proceedings filed against

him. There is absolutely no reason to discard the testimony of this witness who was an independent person having no enmity against any of the accused persons. On all the material particulars, he fully supports the prosecution version and stands corroborated by the panchnama exh. 21.

3.3 The First Grade Jamadar - Mathurbhai Chhaganbhai, in his deposition at exh. 27, has deposed that the muddamal was brought to the police station in a sealed condition. There were in all five items. There was a big packet and three small packets and a cloth bag (`theli'). He has produced the station diary page No.28 and stated that entry No.22, at exh. 28, was made in respect of the said case in his own handwriting. On page 28 of the station diary, entry No. 19 was made at 13.05 p.m. and the said entry is about the information which was received, which is reflected in the intimation given by the P.S.I. to the P.I. in the communication which is at exh. 19.

3.4 The First Grade Jamadar - Madarsinh Kayadsinh, in his deposition at exh. 29, has deposed to the fact that he had received the muddamal in a sealed condition and made entry No. 50 in the register. The muddamal had remained with him till 10 o'clock next morning and all this time, he had kept it duly locked in his custody. A sample of the muddamal alongwith a form was forwarded through police constable Dhanajibhai to the laboratory and the muddamal was received from the Forensic Science Laboratory on 31-3-1992. The deposition of this witness shows that the muddamal remained duly sealed and that there was no scope for tampering with it.

3.5 Police Constable - Dhanajibhai, in his deposition at exh. 31, has stated that he had carried the sealed packet to the Forensic Science Laboratory alongwith a form, and that he had duly delivered it within half an hour to quarter of an hour under receipt exh. 32. He has stated that the packet was in a sealed cover when he delivered it to the laboratory. The receipt exh. 32 corroborates his version and shows that the packet was delivered in a sealed condition to the laboratory on 7-2-1992. The documents at exh. 42 and 46 collectively clearly show that the sample was duly analyzed by the Forensic Science Laboratory and as per the result of the analysis, the Senior Scientific Assistant was of the opinion that the contents of the muddamal were found to be `charas'.

3.6 The Police Inspector - Govindbhai Jairambhai, has

in detail narrated the events that took place on 6-2-1992 about the information being given to him by P.S.I. Chaudhary and about the police party going alongwith the panch witnesses where the watch was to be kept for these two accused persons. The first part of the panchnama was drawn at the police station. He has stated that, while they were keeping a watch, these two persons had emerged from the direction of Suhana Restaurant and were coming towards Kalyan Toll Naka. The accused No.1 was apprehended with the `theli' at the place where they were stopped, while the accused No.2 who tried to run away was caught by the constables Dhanajibhai and Ganpatsinh. According to this witness, he had asked both the accused persons whether they would like to be searched in presence of the superior officer, but they refused. He has then in detail deposed about the contents of the `theli' which was recovered from the accused No.1 and the find of 2 kilograms and 750 grams of `charas' therefrom, as also drawing of the samples and sealing of the articles and their seizure. On all material particulars, he stands corroborated by the particulars mentioned in the complaint exh. 35 and also those mentioned in the panchnama at exh. 21. He has denied the suggestion that the intimation exh.19 was subsequently created.

4. From the oral and documentary evidence on record, we are fully satisfied that these two accused persons were apprehended on 6-2-1992 around 1.00 p.m. by the police in the presence of the panchas where a vigil was being kept on an information which is reflected in exh. 19 and from the accused No.1, a cloth bag (`theli') was recovered, from which 2750 grams of `charas' was found. The `charas' was got weighed through an independent witness Rajendrakumar Patel, who in his deposition at exh. 43, has stated that he was called on 6-2-1992 near Kalyan Mill Police Chowky and that he had weighed some dark coloured material. This witness cannot be expected to remember all the minute details, because, he had just come for a few minutes for weighing the material which was recovered from the accused No.1. The prosecution evidence clearly establishes that the said quantity of material which was recovered from the accused No.1 was `charas'. It is also established that the accused No.2 was accompanying the accused No.1 and at the time of incident, the accused No.2 tried to turn back and run away when they were being stopped by the police party. This conduct of the accused No.2 reflects his guilty mind. The fact that he was accompanying the accused No.1 who was carrying unauthorised `charas' and that they were going in the same direction as per the information which was already received and the fact that the accused no.2

suddenly turned back and started running shows that he was fully in link with the accused No.1 and that the accused No.2 had abetted the crime.

5. It was contended by the learned counsel appearing for both the appellants (the learned counsel who was appearing for the appellant No.1 has also appeared, at the request of the Court, for the appellant No.2, who had expressed before the Court a desire to be given an assistance of this counsel) that, there was no indication of the time, at which the accused were to pass, in the intimation. It is true that the exact time at which these accused persons were to pass is not mentioned in the information which is reflected in exh. 19 and in station diary at entry No. 19. However, the evidence clearly discloses that, after the entry was made at 13.05 p.m., and the intimation exh. 19 was given to the police inspector about the information around the same time. The first part of the panchnama was drawn and the police party alongwith panchas immediately proceeded to the place where these two accused were expected to come. A watch was kept at that place for about 20 minutes and both the accused were apprehended, as recorded in the panchnama exh. 21 and deposed to by the panch witness and other police witnesses who were present. Therefore, mere non-mention of the exact time at which the accused persons were to come at the place where they were apprehended, will not be a flaw in the information and absence of information about the exact time cannot lead to the conclusion that the entire information was fabricated.

6. The learned counsel further argued that, under section 42(2) of the Act, where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, such officer is required to forward forthwith a copy thereof to his immediate official superior. It was submitted that the word `copy' suggested that the verbatim copy of the information should be communicated to the superior. It was submitted that the provision of section 42(2) is mandatory and reliance was placed on the decision of the Bombay High Court in Lamin Bojang v. State of Maharashtra reported in 1996 (4) Crimes 212 in which it has been held that the provisions contained in section 42 of the said Act are mandatory and question whether any prejudice was caused or not to the accused was immaterial. In the said Bombay High Court decision, reliance was placed on the decision of the Apex Court in State of Punjab v. Balbir Singh reported in 1994 Cr.L.J. 3702, in which it was observed that, under section 42(2),

the empowered officer who takes down any information in writing or records the grounds under proviso to section 42(1) should forthwith send a copy thereof to his immediate officer superior. It was held that if there is total non-compliance of this provision, the same affects the prosecution case, and to that extent, it is mandatory. In the case before the Bombay High Court, as recorded in paragraph 10 of the judgement, it was found that, even according to the prosecution, a copy of the information which was reduced in writing by the P.S.I. was not sent by him to his immediate superior official who was the police inspector. In the present case, if we turn to the communication exh. 19, which is proved to have been sent by the P.S.I. to his immediate superior, the police inspector, it becomes obvious that the entire information which was received is verbatim copied in that communication by quoting the same. This communication exh. 19 is addressed by the sub-inspector to the inspector and it records that the sub-inspector had received at 12.55 p.m. the following information from his source, and then the information is narrated verbatim in inverted commas which we need not reproduce. Thereafter, a request was made to the Inspector to take necessary steps to keep a watch on these persons. As deposed to by the police inspector, immediately on receiving this intimation about the information received by the P.S.I., the panchas were called and the police party proceeded to the place where these persons were expected to come, after drawing the first part of the panchnama exh. 21. We are fully satisfied that the copy of the information was sent to the superior official by incorporating the entire information in the communication exh. 19 addressed by the sub inspector to the inspector. The provisions of section 42(2) have, therefore, been fully complied with.

7. The learned counsel for the appellants then argued that at the time when these accused persons were searched, they were not informed about their legal right to get searched before a magistrate or a higher gazetted officer, and that the accused merely being asked as to whether they wanted to be searched before a magistrate or another gazetted officer, was not a sufficient compliance with the provisions of section 50 of the Act. The learned counsel placed reliance on decision of the Supreme Court in State of Punjab v. Jasbir Singh reported in 1996 SCC (Cri.) 1 for the proposition that, in case the police officers had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept it, conduct search and consequentially to seize

the contraband, they are required to inform the offender that he has the right that the search will be conducted in the presence of a gazetted officer or a magistrate.

7.1 The decision in Jasbir Singh's case (supra) cannot assist the appellants, because, as held by the Supreme Court in Kalema Tumba v. State of Maharashtra reported in (1999) 8 SCC 257, the decision in State of Punjab v. Jasbir Singh wherein it was held that though poppy straw was recovered from the bags of the accused, yet he was required to be informed about his right to be searched in the presence of a gazetted officer or a magistrate, now stands overruled by the decision in Balbir Singh's case. It was further held in paragraph 4 of the judgement that if a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his `person'.

7.2 In Kanhaiya Lal v. State of M.P. reported in (2000) 10 SCC 380, in context of the mandatory requirement of section 50 of the said Act, the Court held that when opium was found from a bag which was being carried by the appellant, it cannot be said to be a case where on search of person of the accused, a narcotic drugs or psychotropic substances was found.

7.3 The Supreme Court in Gurbax Singh v. State of Haryana reported in (2001) 3 SCC 28, referring to the decision in Kalema Tumba's case (supra) and Baldev Singh (supra), held that section 50 of the said Act would be applicable only in those cases where the search of the person is to be carried out.

8. In the present case, `charas' was found from a cloth bag which was being carried by the accused No.1 and not from his person, and therefore, it was not necessary to make an offer for search in presence of a gazetted officer or a magistrate, as envisaged by section 50.

8.1 In the above view of the matter, there is no substance in the contention that there is any violation of the mandatory requirement of section 50 of the said Act on the ground that the accused were merely asked whether they wanted to be searched before the magistrate or the gazetted officer, and that they were not told that they had a right to opt for such search.

9. On going through the impugned judgement and order, we find ourselves in complete agreement with the reasoning and findings of the learned trial Judge. The

sentence of rigorous imprisonment and fine are the minimum which can be imposed for the offences for which the accused are convicted. However, as regards the rigorous imprisonment of three years awarded to both the accused in default of payment of fine of Rs. 1 lakh imposed on each of them is concerned, we find that the said period of rigorous imprisonment of three years on these two accused, who have not been able to pay the fine and who, as stated by their learned counsel, are not in a position to pay the fine, would work harshly on them. Therefore, while maintaining the sentence of 10 years rigorous imprisonment and a fine of Rs. 1 lakh already imposed on each of these two accused persons by the trial Court, we modify the order of sentence by directing that, in default of payment of fine of Rs. 1 lakh, the accused will undergo rigorous imprisonment for a period of one year in case of each of the accused persons. Subject to this modification, the appeal is dismissed.

JUNE 25, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

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